

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

CLIFFORD L. JACKSON,

Petitioner,

vs.

NEIL MCDOWELL,<sup>1</sup> Acting Warden,

Respondent.

Case No: C 13-5407 SBA (PR)

**ORDER DENYING MOTION TO  
DISMISS, GRANTING MOTION TO  
STAY, AND ADMINISTRATIVELY  
CLOSING ACTION**

**I. INTRODUCTION**

Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising three claims. Before the Court are (1) Respondent's motion to dismiss the petition for failure to exhaust state court remedies (Dkt. 16) and (2) Petitioner's motion to stay his federal petition while he exhausts his remedies in state court (Dkt. 26). For the reasons set forth below, the Court GRANTS Petitioner's motion to stay and DENIES Respondent's motion to dismiss, without prejudice.

**II. DISCUSSION**

Petitioner concedes that one of the claims in his petition is unexhausted, meaning that his petition is a mixed petition. Respondent thus argues that the action must be dismissed as a mixed petition under Rose v. Lundy, 455 U.S. 509, 510 (1982). Petitioner, however, seeks leave to return to state court to exhaust his unexhausted claim. Respondent does not oppose the stay request.

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<sup>1</sup> Neil McDowell, the current acting warden of the prison where Petitioner is incarcerated, has been substituted as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

1 Prisoners in state custody who wish to challenge in federal habeas proceedings either  
2 the fact or length of their confinement are first required to exhaust state judicial remedies  
3 by presenting the highest state court available with a fair opportunity to rule on the merits  
4 of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b),(c);  
5 Rose, 455 U.S. at 515-16. If available state remedies have not been exhausted as to all  
6 claims, the district court must dismiss the petition. Id. at 510; Guizar v. Estelle, 843 F.2d  
7 371, 372 (9th Cir. 1988). A dismissal solely for failure to exhaust is not a bar to returning  
8 to federal court after exhausting available state remedies. See Trimble v. City of Santa  
9 Rosa, 49 F.3d 583, 586 (9th Cir. 1995).

10 Habeas petitioners may seek a stay of the petition pursuant to Pace v. DiGuglielmo,  
11 544 U.S. 408, 416 (2005), pursuant to which a prisoner may file a protective petition in  
12 federal court, requesting that the court stay federal habeas proceedings until all state  
13 remedies are exhausted. District courts have the discretion to issue stays upon determining  
14 that good cause existed for the petitioner's failure to exhaust his claims in state court, and  
15 that such claims are potentially meritorious. Rhines v. Webber, 125 S. Ct. 1528, 1535  
16 (2005); see also Pace, 544 U.S. at 416.

17 Here, Petitioner's unexhausted claim challenges his sentence of thirty-five years to  
18 life under California's Three Strikes law. Though Petitioner did not raise this claim on  
19 direct appeal or in his first state habeas petition, he is not precluded from raising the claim  
20 in a second, state habeas petition. Moreover, the claim states a cognizable basis for federal  
21 habeas relief. This instant petition is Petitioner's first federal challenge to his conviction  
22 and sentence, and there is no evidence that he seeks the stay for improper purposes. See  
23 Fetterly v. Paskett, 997 F.2d 1295, 1301-102 (9th Cir. 1993) (holding that a stay for the  
24 purpose of permitting exhaustion of unexhausted claims should be granted only if the  
25 claims petitioner seeks to pursue are cognizable under § 2254; there is a likelihood of  
26 prejudice to petitioner if the stay is not granted; and there is no evidence that the motion for  
27 a stay is brought to delay, vex, or harass, or that the request is an abuse of the writ).  
28 Although it is not entirely clear why Petitioner did not raise this claim earlier, the Court

1 notes that Respondent has not opposed Petitioner's stay request or claimed that he will be  
2 prejudiced in the event the Court imposes a stay and allows Petitioner to return to state  
3 court to exhaust his unexhausted claim. Accordingly, the Court GRANTS Petitioner's  
4 request for a stay and declines to reach Respondent's motion to dismiss.

5 **III. CONCLUSION**

6 For the reasons stated above,

7 **IT IS HEREBY ORDERED THAT:**

8 1. Respondent's motion to dismiss the petition for failure to exhaust state court  
9 remedies (Dkt. 16) is DENIED without prejudice to refile if Petitioner fails diligently to  
10 pursue exhaustion in state court of his unexhausted claim.


11 2. Petitioner's request for a stay (Dkt. 26) is GRANTED. These proceedings are  
12 hereby STAYED pending Petitioner's exhaustion of his state judicial remedies. Petitioner  
13 must act diligently in exhausting his state judicial remedies, or the stay may be lifted. He  
14 must file quarterly reports describing the progress of his state court proceedings,  
15 commencing **twenty-eight (28) days** from the date of this Order and continuing every  
16 **ninety (90) days** thereafter until his state court proceedings are terminated. He must also  
17 attach to his status reports copies of the cover page of any document that he files with or  
18 receives from the California Supreme Court relating to the unexhausted claim.

19 3. The Clerk of the Court shall ADMINISTRATIVELY CLOSE the file.  
20 Nothing further will take place in this action until Petitioner receives a final decision from  
21 the California Supreme Court and, within **twenty-eight (28) days** of doing so, moves to  
22 reopen the action, lift the Court's stay and amend the stayed petition to add the newly-  
23 exhausted claim.

24 4. This Order terminates Docket Nos. 16 and 26.

25 **IT IS SO ORDERED.**

26 Dated: 1/30/15

27   
SAUNDRA BROWN ARMSTRONG  
28 United States District Judge